IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 788

MAURICE D. ADAMS, SYLVIA JACOBS, MARTIN LASHER, PEARL LASHER, E. FRANK O'HARA, SAMUEL BLOOM, ABRAHAM LINDNER, ELLA LINDNER, SUNNE MILLER, GENIA BERK, CHARLES GILBERT, DOROTHY LEE, HARVEY LEE, HOWARD N. STACK AND MAX W. WINN,

Petitioners,

vs.

UNITED STATES DISTRIBUTING CORPORATION, THE PITTSTON COMPANY, ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

JOHN J. WICKER, JR.,
GEORGE M. JAFFIN,
CHARLES WINKELMAN,
SEYMOUR M. HEILBRON,
Counsel for Petitioners.

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Petitioners,

vs.

UNITED STATES DISTRIBUTING CORPORATION, THE PITTSTON COMPANY, ET ALS.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Your petitioners, Maurice D. Adams, Sylvia Jacobs, Martin Lasher, Pearl Lasher, E. Frank O'Hara, Samuel Bloom, Abraham Lindner, Ella Lindner, Sunne Miller, Genia Berk, Charles Gilbert, Dorothy Lee, Harvey Lee, Howard N. Stack and Max W. Winn, are citizens of the United States, residing in various States, and are dissenting preferred

NOTE: Italics or other type-emphasis is supplied in this petition.

stockholders of United States Distributing Corporation (hereinafter called "Distributing"), a Virginia corporation chartered and organized in 1919 which was liquidated and ceased to exist pursuant to a merger forced through by The Pittston Company (hereinafter called "Pittston"), a Delaware corporation which was the dominant majority stockholder, and which acquired all of the assets of your petitioners' corporation by said merger. Your petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Appeals of Virginia—which is the Court of last resort in the State of Virginia—in the above-entitled case, which was heard by that Court on an appeal from a final judgment of the Law and Equity Court of the City of Richmond, Virginia. Said decision construed the Virginia Merger Statute (Virginia Code 1919, Section 3822, as amended by Chapter 380 of the Acts of 1922) and held that said amended statute as amended in 1922, afforded an appraisal for the "fair cash value" of their stock as the sole and exclusive remedy of dissenting preferred stockholders in case of merger.

The original Virginia Merger Statute, in force at the time your petitioners' corporation was chartered and organized in 1919, had been construed by the Supreme Court of Appeals of Virginia as being non-exclusive. (*Winfree* v. *Riverside,* 113 Va. 717, 75 S. E. 309.) The present decision, which your petitioners here complain of, likewise recognized the fact that under the original Virginia Merger Statute dissenting preferred stockholders like your petitioners had the option of pursuing statutory appraisal proceedings or invoking the aid of equity for the full enforcement of their contractual rights (R. 119). Said decision held that while the statutory appraisal remedy had not been exclusive in its original form, it became exclusive by the amendment of 1922 (R. 121). Said decision held that

the amended statute (said amendment having been enacted in 1922, three years after your petitioners' corporation was chartered and organized and began business under the laws of Virginia) had the effect of destroying the pre-existing equitable right of dissenting preferred stockholders, in merger cases, to invoke the aid of equity for the enforcement of their contractual rights (R. 127).

Opinions Below

The Law and Equity Court of the City of Richmond failed to hand down a written opinion. The opinion of the Supreme Court of Appeals of Virginia is officially reported in 34 Southeastern, 2nd Series, at pages 244-252. Duly certified copy of said opinion is included in the Transcript of Record filed herewith (R. 114-127). Petition for rehearing in the Supreme Court of Appeals of Virginia was denied by that Court on September 4th, 1945 (R. 167).

Jurisdiction

The final judgment for the Supreme Court of Appeals of Virginia was entered on September 4th, 1945. By order entered on the 27th day of November, 1945, the Chief Justice of this Court granted an extension until the 31st day of January, 1946, within which to file this application for writ of certiorari (R. 168). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, on the ground that the Virginia Merger Statute (Virginia Code, 1919, Section 3822, as amended by Acts 1922, Chapter 380—Now Section 3822, Virginia Code (Michie) 1942) as construed by the Supreme Court of Appeals of Virginia in this case, destroyed a vested contractual right of petitioners in contravention of the provisions of Article 1, Section 10 of the United States Constitution.

Question Presented

Whether a State Merger Statute which, at the time a corporation was chartered and organized in that State, afforded to minority dissenting preferred stockholders an appraisal proceeding for the "fair cash value" of their stock (alleged to be $55 per share) as a cumulative optional remedy, in addition to the pre-existing equitable remedy for the enforcement of their contractual rights ($184 per share, this being par value plus accrued unpaid dividends), could be lawfully amended some years thereafter so as to make the appraisal remedy exclusive and thereby destroy the *vested contractual rights* of minority dissenting preferred stockholders.

This question raises the point as to the constitutional validity of a State statute which would permit a majority stockholder to impair and depress the value of investments owned by investors scattered throughout the United States, in violation of the terms of the stock contract between the holders of said investments and the corporation which issued the stock certificates evidencing said investments.

The Stage in the Proceeding in the Courts Below at Which and the Manner in Which the Constitutional Question Was First Raised.

In the original Bill of Complaint (R. 72-85) filed by petitioners in the Law and Equity Court of the City of Richmond, the court of first instance, petitioners repeatedly alleged that the suit of petitioners was based on their contractual rights, fixed and vested, and that such rights had been impaired and violated. This issue was raised and emphasized in Sections 12, 20, 23, 25, 30, 33 and 35 of said original Bill of Complaint.

For example, in Section 12 of the Bill (R. 76) petitioners asserted:

> "By virtue of their contractual rights as preferred stockholders * * * your complainants * * * were entitled to receive * * * not less than $184 per share. * * * This right was and is a contractual right, fixed and vested."

The question was again raised in the Supreme Court of Appeals of Virginia. The entire petition (R. 1-71) was devoted to a statement of facts, the assignments of error and a discussion of the decisions of that and other courts relating to similar contractual vested rights. Thus, in said petition for appeal (R. 7) in paragraph (3), under the heading "The Position of Appellants," petitioners asserted that

> "This was a vested contractual right which no merger—consummated without appellants' consent—could destroy or impair."

Further on in the Appendix to the Appeal Petition (R. 62) petitioners asserted that the

> "Appraisal Statute would be unconstitutional if construed as exclusive."

Petitioners cited and quoted from *Clearwater* v. *Meredith*, 1 Wall. 25 at 39, and *Craddock-Terry* v. *Powell*, 181 Va. 441, 25 S. E. (2nd) 365 at 373 in support of this contention as to unconstitutionality (R. 62-63).

On page 63, petitioners quoted the following from the *Craddock-Terry* decision, *supra:*

> *"The Legislature, in the exercise of this power, has no right to enact a law which impairs vested contractual rights."*

In its opinion in this case the Supreme Court of Appeals of Virginia recognized and passed upon this point (R. 125) when the opinion said:

> "The appellants argue that the effect of the merger and the application of the terms of the appraisal statute is to violate the contract which they had with the corporation as embodied in its charter and in the provisions of the certificates of stock held by them."

When the Supreme Court of Appeals of Virginia reversed the trial court, overruled petitioners' said contention, dismissed petitioners' suit and held that the Virginia Merger Statute was exclusive and consequently prohibited petitioners from seeking enforcement of their contractual rights, petitioners again raised the Federal question in their "Petition for Re-hearing" (R. 129-166).

Petitioners' Petition for Re-hearing cited Article I, Section 10 of the United States Constitution (R. 131) and among other things pointed out the following:

> "*Outline of Grounds for Re-hearing.* Your Petitioners are advised and believe and therefore represent that the decision of your honorable Court is erroneous and should be re-heard, vacated and revised because:
>
> * * * (2) Your decision, in effect, impairs the obligation of contract between your petitioners and 'Distributing,' as expressed in the charter and on the stock certificates of said corporation, and thus deprives petitioners of their constitutional rights." (R. 136)
>
> "*The Constitution of the United States expressly prohibits the enactment of any law impairing the obligation of contracts. Your decision in the case at bar, if adhered to, would violate the constitutional rights of petitioners in that it would, in effect, impair the obligations of the contract between petitioners and their corporation, and would substitute in place of contractual agreement of the parties (par plus accrued dividends) something entirely different ("fair cash value").* (R. 144)

This was the first time in the proceedings that petitioners were confronted with a situation where there was any cause, reason or excuse for specifically and expressly asserting that the statute was repugnant to Article I, Section 10, of the Constitution (*Saunders* v. *Shaw,* 244 U. S. 317, 37 S. Ct. 638; "Jurisdiction of the Supreme Court of the United States" by Robertson and Kirkham, Sec. 71, page 120).

The manner in which the validity of the Virginia Statute (Code Section 3822) was raised in the courts below comes squarely within the principle laid down by this Court in the case of *People of State of New York* v. *Zimmerman,* 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184, in which Mr. Justice Van Devanter, speaking for this Court, said, at page 67:

> "*There are various ways in which the validity of a state statute may be drawn in question* on the ground that it is repugnant to the Constitution of the United States. *No particular form of words or phrases is essential,* but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intentment that this was done, the claim is to be regarded as having been adequately presented."

State Statutes Involved

The Virginia Merger Statute, the validity of which is involved, is Virginia Code Section 3822 (Acts of General Assembly of Virginia, Ex. Sess. 1902-3-4, Chap. 270, p. 437, at pp. 476-479; Chap. V, Sec. 41; as amended, Acts of 1922, Chap. 380, p. 625, at pp. 632-634). The pertinent portion of such statute is reproduced at the end of a printed booklet entitled "Proxy Statement and Agreement of Merger," which was introduced in evidence in this case, and which has been certified as a part of the transcript of record filed herewith (R. 169 *et seq.*). Substantially, the statute provides that any non-assenting stockholder may obtain an

appraisal of the "fair *cash* value" of his stock upon application to one of the courts named in the statute provided he has given to the merged corporation notice of dissatisfaction within three months after the merger, and provided further that no settlement had been agreed upon with the corporation within 30 days after the expiration of the first three months period. The statute authorizes the appraisers appointed by the court to conduct complete investigations within and without the state, to subpoena witnesses and necessary records, and to return with their appraisal all evidence produced before them. The court is authorized to enter judgment upon the appraisal or to substitute the court's own figure if the court disapproves the appraisal determined by the appraisers. The statute further provides that any stockholder who fails to give written notice of dissent within said three months period shall thereafter be conclusively presumed to have assented to the merger and shall not thereafter have any rights whatever except those granted to assenting stockholders under the merger plan. However, the statute does not contain any language expressly or by necessary implication depriving dissenting stockholders of the pre-existing right to insist upon fulfillment of their contractual rights, as set forth in the corporation charter, rather than pursuing appraisal proceedings. The Supreme Court of Appeals of Virginia, however, in its recent decision, from which an appeal is here sought, has nevertheless construed the statute as destroying the said pre-existing contractual rights of dissenting stockholders such as petitioners.

In addition Virginia Code Section 3792 of the General Corporation Law of Virginia has a bearing in this case, inasmuch as it expressly provides that it shall apply to all Virginia corporations and it expressly prohibits any corporation from changing the priority of any stockholder, as

to assets or dividends, without the consent of at least 90% in interest of the class of stockholder affected. The pertinent parts of this statute are as follows:

> "Every corporation shall have power to create two or more kinds of stock any of which may be stock with par value or stock without par value, of such classes, with such designations, preferences and voting powers, or restrictions or qualifications thereof, as shall be stated and expressed in the charter * * * or in any amendment thereof. * * * The holders of such preference stock shall be entitled to such rights upon the dissolution or any distribution of the assets of the corporation as may be expressed in the certificate of incorporation or any amendment thereof. * * *
>
> "*No corporation, whether heretofore or hereafter chartered, shall, without ninety per centum consent in interest of the class or classes of stock affected thereby, have the power to change* the voting rights and/or *the priority as to assets or dividends of any stockholder, or to change the amount or time at which any preferred stock is redeemable, or to issue any stock taking priority, either as to assets and/or dividends, over any preferred stock then issued and outstanding,* and this ninety per centum requirement shall apply regardless of whether said stock so affected had theretofore the right to vote or not."

It will be noted that the foregoing statute (last enacted in 1938 which was sixteen years subsequent to the amendment of the Virginia merger statute in 1922) is all inclusive in its terms and does not in any way indicate or permit any exception in case of merger. The record in this case shows that consent to the merger was given by the holders of only 89.11% of the preferred stock outstanding, which obviously was less than the 90% minimum required by Virginia Code Section 3792 (R. 105).

Statement .

United States Distributing Corporation was a holding corporation chartered in Virginia in 1919, with total assets of over seventeen million dollars, but with its real offices and all of its officers and directors in New York or elsewhere outside of Virginia. At the time of the merger it had outstanding 99,915½ shares of 7% cumulative preferred stock of a par value of $100 per share. 62,879 shares of this preferred stock was held by The Pittston Company, a Delaware corporation (R. 98, par. 13). Petitioners own 1187 shares of said preferred stock (R. 73).

By contract between your petitioners and Distributing, as expressed in the corporate charter and in the certificates of stock issued to your petitioners, your petitioners were entitled, in case of liquidation or dissolution or distribution of the assets of Distributing, to receive out of such assets the par value ($100 per share) of their stock plus all accrued accumulated unpaid dividends. The exact language of the charter contract and the stock certificates is as follows (R. 74):

> "In case of the liquidation or dissolution of this corporation, or a distribution of its assets, except by payment of dividends, the assets of this corporation shall first be applied toward paying to the holders of the preferred stock an amount equal to the par value of their respective holdings of such preferred stock plus all accrued and unpaid dividends thereon. * * *"

Over the dissent and protest of your petitioners, Pittston, being the dominant majority stockholder, effected a merger of Distributing and Pittston. As a result of this merger Distributing was swept out of existence, dissolved and liquidated, and all of its assets were acquired by Pittston. At the time of the merger the accumulated unpaid dividends on the stock held by petitioners amounted to $84.00 per

share. Your petitioners own in the aggregate 1187 shares and consequently were entitled to be paid a total of $218,400.00 for their holdings out of the assets of their corporation.

When the merger was consummated, the officers of Pittston and Distributing were practically identical; and the Board of Directors were identically the same, with the exception of one separate and different Director on the Board of each corporation. The President and the majority of these officers and directors had none of their own money invested in Distributing. Distributing was thoroughly solvent and comparatively successful. By contrast, Pittston had no net income whatever for several years (1939, 1940, 1941) preceding the merger (R. 33-34).

As a result of the merger, and the decision of the Supreme Court of Appeals of Virginia, petitioners are required to surrender their stock for the "fair cash value," which Pittston alleges is only $55.00 per share; although Distributing's assets admittedly were far more than sufficient to pay all dissenting stockholders the full par value plus accrued unpaid dividends (R. 21, last paragraph). On this basis the aggregate loss to petitioners between the value guaranteed by contract and fixed by the terms of the merger is $153,123.00.

This suit was brought in the Law and Equity Court of the City of Richmond by petitioners, as minority dissenting preferred stockholders of Distributing, to invoke the aid of a court of equity in the enforcement of their vested contractual rights, viz. the payment of par value plus accrued unpaid dividends out of Distributing's admittedly ample assets. By decree entered on September 5, 1944 (R. 107), the trial court recognized the right of petitioners, as dissenting preferred stockholders, to the aid of equity in the enforcement of these contractual rights, but re-

ferred the case to a Commissioner to determine whether the assets were sufficient to make full payment upon all preferred stock outstanding at the time of merger, including that held by assenting stockholders as well as that held by dissenting stockholders.

On appeal to the Supreme Court of Appeals of Virginia from said decree entered by the trial court, the following assignments of error (among others) were made (R. 9):

That the Law and Equity Court of the City of Richmond committed material and reversible error in its decree of September 5th, 1944, as follows:

> "(1) In declining to hold * * *:
>
> (a) that the distribution of assets to common stockholders estopped Pittston from claiming that the assets were insufficient for full satisfaction of contractual rights of appellants and other dissenting preferred stockholders; and
>
> (b) that the appellants should be paid the full contractual value of their stock ($184 per share plus interest) since the admitted value of the net assets were more than sufficient to pay this full value to appellants and all other dissenting preferred stockholders; * * *"

The Supreme Court of Appeals of Virginia refused to correct the decree of the lower court, but dismissed the bill of complaint originally filed; without prejudice, however, to petitioners "to pursue, in the proper court, their remedy for the fair cash value of their stock" rather than recover the par value plus accrued cumulative dividends, as petitioners are entitled to recover, under their vested contractual rights.

Specification of Error to Be Urged

The Supreme Court of Appeals of Virginia erred:

(1) In dismissing petitioners' original Bill of Complaint.

(2) In holding that the Virginia merger statute (Virginia Code, Section 3822—as amended in 1922, which was three years after petitioners' corporation was chartered and organized in 1922—) was valid, although said amended statute as construed by the court, not only impaired but actually destroyed the obligation of the contract whereby petitioners were entitled to demand and receive out of the assets of their corporation—upon its liquidation or dissolution or distribution of its assets—the par value of their preferred stock plus accrued cumulative dividends thereon; said statute as so construed being repugnant to Article I, Section 10 of the Constitution of the United States.

(3) In overruling petitioners' contention that said statute, if construed as an exclusive remedy for the enforcement of petitioners' rights, would destroy petitioners' vested contractual rights and consequently would be repugnant to Article I, Section 10, of the Constitution of the United States.

(4) In failing to hold that the continuing corporation, Pittston, be required to pay to petitioners out of the assets it received from Distributing the par value of petitioners' stock, plus accrued dividends thereon, since Pittston acquired in the merger with Distributing assets which Pittston admitted were far more than sufficient for such purpose.

Reason for Granting the Writ

The Amended Virginia Merger Statute as construed by the Supreme Court of Appeals of Virginia,—

(1) Permits the destruction of petitioners' vested property rights in accumulated accrued dividends, which at the time of the merger amounted to $84.00 per share, by a dominant majority stockholder—in violation of your petitioners' constitutional rights.

(2) Impairs the obligation of the contract between petitioners' and Distributing as expressed in its charter, and thus deprives petitioners of their constitutional rights as guaranteed by Article I, Section 10, of the Constitution of the United States.

(3) Undermines the stability of investments, based upon express contract provisions relating to the redeemable value thereof, even though sufficient assets are available for such purpose; thus having a depressing effect upon the investment markets.

In spite of the position heretofore adhered to by the Supreme Court of Appeals of Virginia, that Court has now handed down its decision in the instant case, completely ignoring and disregarding petitioners' vested contractual rights, although the record from its inception reveals that this constitutional point was relied upon by your petitioners in each of the Courts below.

This decision, we maintain is contrary to the principle laid down by this Court. *Coombes* v. *Getz,* 285 U. S. 434, 52 S. Ct. 435, 76 L. Ed. 866.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAURICE D. ADAMS, SYLVIA JACOBS, MARTIN LASHER, PEARL LASHER, E. FRANK O'HARA, SAMUEL BLOOM, ABRAHAM LINDNER, ELLA LINDNER, SUNNE MILLER, GENIA BERK, CHARLES GILBERT, DOROTHY LEE, HARVEY LEE, HOWARD N. STACK AND MAX W. WINN,

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January 28, 1946.